United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

No. 74-1336

United States Court of Appeals

FOR THE SECOND CIRCUIT

Nos. 74-1336, 74-1495

LORENZ SCHNEIDER COMPANY, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review and Cross-Application for Enforcement of an Order of The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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On Petition for Review and Cross-Application for
Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the certified representative of its employees in an appropriate bargaining unit.

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon the petition of Lorenz Schneider Company, Inc. (hereafter the "Company") pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Section 151, *et seq.*), for review of an order of the National Labor Relations Board issued on February 22, 1974,[1] and reported at 209 NLRB No. 16 (D & O 1-11).[2] The Board, pursuant to Section 10(e) of the Act, has cross-applied for enforcement of its order. This Court has jurisdiction of the proceedings, the unfair labor practices having occurred in New Hyde Park, New York.

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[1] On February 27, 1974, the Board issued an order amending its decision by deleting certain language. See n. 16, *infra*.

[2] As the Board's order is based in part on findings made in a representation proceeding under Section 9 of the Act (Board Case No. 29-RC-1980; 203 NLRB No. 45), the record in the representation proceeding is part of the record before this Court pursuant to Section 9(d) of the Act as well as the record in the unfair labor practice proceeding (Board Case No. 29-CA-3459). The appendix in this case will be prepared under the deferred method as provided in Rule 30 of the Second Circuit's Rules. "D & O" references are to the Board's Decision and Order in the unfair labor practice proceeding. "D&DE" references are to the Regional Director's Decision and Direction of Election in the representation proceeding. "DOR" references are to the Board's Decision on Review in the representation proceeding. Exhibits in the unfair labor practice hearing introduced by the General Counsel are designated "G.C. Exh." References to the transcript in the representation proceeding are designated "Tr." Exhibits in the representation proceeding introduced by the Board, the Company, and the Union are designated "Bd. Exh.", "E. Exh.", and "U. Exh." respectively. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the duly certified representative of its employees in an appropriate unit. In making this finding, the Board determined that certain distributors were employees of the Company and thus properly included in the bargaining unit. The facts upon which the Board made its findings are summarized below:

A. The representation proceeding

On April 26, 1972, the Union[3] filed a Petition for Certification of Representative for a unit consisting of all "driver-salesmen working out of 2000 Phaya Avenue, New Hyde Park, New York, and at Riverhead, New York"[4] (Bd. Exh. 1). The Company took the position that the petition should be dismissed because the requested unit consisted of distributors who, it contended, are not "employees," as defined in Section 2(3) of the Act, but independent contractors.[5] A hearing was held commencing on May 12, 1972, at which the following facts relevant to this issue were adduced:

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[3] Independent Routemen's Association.

[4] On May 14, 1973, the Company and the Union stipulated that the unit description in the Decision and Direction of Election issued by the Regional Director in Case 29-RC-1980 be amended to read:

> All distributors employed by the Employer, excluding all office employees, warehouse employees, all other employees, guards, and supervisors as defined in the Act (G.C. Exh. 1(e)-(f)).

[5] The Company also contended that the Union constituted a trade association rather than a labor organization.

The Company is a franchised dealer for a number of snack food manufacturers, such as Wise Potato Chips; and it serves an area including the five boroughs of New York City and Nassau and Suffolk counties in New York (D&DE 2; Tr. 161). The Company owns and operates warehouse facilities in New Hyde Park and Riverhead, New York, where it stores the various snack foods items which it buys from the manufacturers. The Company, in turn, effectuates the distribution of these products to retail store customers (D&DE 2; Tr. 267, 437, 608). Prior to 1967, the Company employed individuals known as route salesmen, concededly "employees", who drove Company trucks and distributed the snack products to the Company's retail store customers (D&DE 2; Tr. 250-251). At that time, these route salesmen and the Company's warehousemen were represented by Teamsters Local 802 (D&DE 2; Tr. 454-455).

In 1967, the Company changed its system of operation by allowing the route salesmen to purchase their routes from the Company (D&DE 2; Tr. 472-473). The existing route salesmen, and others who subsequently joined the Company's operations, entered into a contract with the Company whereby they purchased their delivery routes from the Company, agreeing to pay a price, based on the average weekly sales of the route multiplied by a given factor, in exchange for the rights to the earnings from the routes (D&DE 2; Tr. 193-194, 251-252, 472-473, Ex. Exh. 4A-4T). Thereafter, the route salesmen were known as "distributors" and ceased to be represented by Teamsters Local 802 (D&DE 2; Tr. 472-473).

In December 1971, several distributors began to express as a group their dissatisfaction with the Company (D&DE 7-8; Tr. 60-61, 98, 103). As a result of these discussions, the distributors held a number of meetings beginning in February or March, 1972, at which they formed the

Union and adopted a constitution and by-laws for their organization (D&DE 7-8; Tr. 53-54, 104, 123-124). The Union consisted solely of individuals who worked as distributors for the Company and 2 distributors for a related company (Tr. 102-104, 117-118, E. Exh. 1). At these meetings, the distributors discussed several matters relating to their employment, including "percentages, rebates, price of our merchandise, paying for the shelving that we didn't particularly care for, the pads that we had to pay for . . . the discounting of merchandise" (Tr. 61-62). Thereafter, the organization retained counsel for the purpose of commencing negotiations with the Company (D&DE 7-8; Tr. 62, U. Exh. 4).

There are 52 distributors under contract with Company. Persons seeking to buy available distributorships from the Company are interviewed by the general manager only after filling out a financial form which the Company calls a "balance sheet" and submitting to a mathematics test and a general intelligence test (D&DE 2; Tr. 178-179, 187-192, E. Exh. 3). Then, those applicants acceptable to the Company first sign an interim agreement providing for a 60-day probationary period during which either party may change its mind with no forfeiture, except that an individual who changes his mind after he has been trained by the Company must pay a fixed sum for this training (D&DE 2; Tr. 200-201, E. Exh. 4-A). During this probationary period, the prospective distributor is taken on the route he will ultimately purchase by one of the Company's distributor representatives. The distributor representative accompanies the trainee on his route, showing him where the stores are located and instructing him how to service the accounts properly (D&DE 2; Tr. 169-170, 228).

At the end of the probationary period the Company and the individual enter into a written agreement whereby the individual purchases the route from the Company by signing a promissory note, while the Company retains a chattel mortgage for the unpaid balance of the purchase

price (D&DE 2; Tr. 231, E. Exh. 5A-5E). The agreement consists of a standard form contract, drawn up by the Company, which is the same for all distributors *(ibid.)*. While operating the route, the distributor binds himself, *inter alia,* to maintain accurate route and customer books; to use his best efforts to distribute, procure sales, obtain increased space and new accounts for the franchised products of the Company, without regard to the territory established for his route; to grant merchandise discounts or rebates to retail stores on the same basis as determined by the Company; and to follow the Company's book of procedures for operating routes (D&DE 2; E. Exh. 5A-5E). The agreement further provides that the Company may terminate the agreement for failure to make payments under the promissory note, for handling competing products, for wilful neglect of customers, for "any act deemed dishonest to customer or [the Company]," or for several other infractions enumerated therein (E. Exh. 5E, P. 3). The agreement also states that the Company "shall not be liable for any act or acts of the distributor," that "the distributor shall be deemed at all times to be an independent contractor" (E. Exh. 5E, P. 2).

As for the financial arrangements, the agreement provides that the distributors' earnings shall be approximately 20 percent of sales, less rebates (D&DE 3; E. Exh. 5E, P. 2). Distributors are able to increase their gross earnings either by soliciting new accounts or by purchasing individual accounts from either the Company or other distributors, subject to certain restrictions (D&DE 3; Tr. 865-867). Distributors may not solicit business outside the area serviced by the Company, nor may they solicit so-called "protected" accounts which are stores that are already serviced by another company also distributing the same products, such as Wise Potato Chips, in the Company's franchised area (D&DE 3; Tr. 717-719, 865-866). Two other companies distribute such products

in the Company's franchised area *(ibid.)*. Distributors are also prevented from soliciting business from any new branch of a chain store which opens (D&DE 3; Tr. 866-867). The Company makes distributors return all monies earned if they inadvertently sell merchandise to an unauthorized customer (Tr. 856). Distributors may sell their routes at any time to either the Company or a third party, but any third party purchaser must first be approved by the Company (D&DE 2; Tr. 740-742). Any distributor who does sell his route is barred from competing for the business of his former customers for a period of one year by the agreement's non-competition clause (D&DE 2; E. Exh. 5A-5E).

All distributors drive trucks painted with the name of Wise Potato Chips (the primary manufacturer of goods sold by the Company), as required by the Company's book of procedures (D&DE 3; Tr. 759-760). Fourteen distributors own their trucks, having purchased them either from outside truck dealers or from a Company subsidiary (D&DE 3; Tr. 199, 253-254, 257-259). The rest of the trucks are leased from the Company subsidiary (D&DE 3; Tr. 257-258). Most of the distributors garage their trucks at the Company since the lease requires them to be kept overnight at a garage consented to by the Company subsidiary, and some distributors who own their trucks also use this garage for a monthly fee (D&DE 3; Tr. 260, E. Exh. 6). The lease provisions also require that the trucks be used only on weekdays and only on the snack-food route of the lessee (D&DE 3; E. Exh. 6).

The Company effectively controls the prices at which distributors resell their merchandise to their retail accounts, most of which are chain stores (DOR 2-3; 605-614, 264). The Company's practice is to segregate chain stores and independent stores into separate routes (DOR 3; Tr. 264). Those distributors, approximately 30, who have chain store

routes, are required by the Company to abide by prices negotiated entirely between the stores and the manufacturers of the Company's products (DOR 3; Tr. 608-609, 643). Based on this price, a rebate of 3 percent on monthly sales over $100 and 5 percent on monthly sales over $200 is paid to each customer (Tr. 1528, U. Exh. 36). The Company's control over such prices is absolute because chain stores pay the Company directly, after having automatically deducted their rebates, and the Company computes the distributors' earnings on their sales solely on the basis of the set prices (DOR 3; Tr. 605-614). With respect to distributors who have independent store routes, some independent stores group with others into store associations or "cooperatives" that deal with the manufacturer directly and receive the same prices and rebates as chain stores (Tr. 1274, U. Exh. 36). The Company itself substantially controls prices paid by other independent stores through the frequent advertisement in trade publications of price discounts on the distributor's merchandise, and in some cases, the Company directly notifies independent stores of such price reductions (DOR 3; Tr. 917-927, 995-1001, 1030, 1126). Where distributors have attempted to refuse to grant these discounts or temporary price reductions, the customers have retaliated by refusing to make further purchases and thereby effectively forced them to grant the discounts (DOR 3; Tr. 439-440). Additionally, the Company has sent out memoranda to the distributors telling them all to charge the same price so that the Company and/or the distributors will not be charged with violations of the Robinson-Patman Act and The Federal Trade Commission's uniform pricing regulations thereunder (D-&DE 4; U. Exh. 38). The Company's book of procedures also requires, in provision 4, that distributors offer the same discounts to all of their customers (E. Exh. 12, P. 1).

The distributors' agreement with the Company provides that distributors must abide by the Company's "Book of Procedures for Operating Distributor Routes" (DOR 3; E. Exh. 5E, P. 4). While some of the provisions in this book of procedures are hortatory, the Company admittedly considers distributors bound by the provisions and has enforced compliance with them (DOR 3; 824-838, E. Exh. 12). For example, Provision 19, which indicates that shelving for merchandise is ". . . available at the [Company's] warehouse . . . if desired," has been interpreted by the Company so as to require distributors to purchase such shelving for their retail accounts (DOR 3; E. Exh. 12, P. 3). The Company and customers such as chain stores decide on how much shelving is necessary. The Company installs it, and it then bills the distributor for the cost (DOR 3; Tr. 601-602). When a customer insists on having more shelving, the Company directs the distributor to install it (DOR 3; Tr. 862). If the distributor resists this directive, the Company forces him to accede by telling him he can no longer service the store or, in some instances, by installing the shelving itself and forcing the distributor to pay by deducting it from his earnings (DOR 3; Tr. 1743-1745, 1804, 1809). The Company has similarly enforced provision 22 which states that, "stores must be served at least once each week, and . . . as many more times each week as is necessary to keep the stands, racks, and gondolas adequately supplied with fresh merchandise" (DOR 3; E. Exh. 12, P. 4). In one instance in which a dispute arose between the Company and two distributors resulting in their refusal to make deliveries on their route for a three-day period, after the third day the Company had its employees break the padlocks on the distributors' trucks, load them with merchandise, and make deliveries to all the stores on the routes (DOR 3; Tr. 1660-1668). The Company paid no commissions to the distributors for sales made on that day *(ibid.)*.

The Company also exercises control over the activity of distributors by virtue of its regulations pertaining to the operation of its warehouses. Although distributors have no set hours of work and can arrange the order and frequency with which they service customers, subject to the aforementioned limitations, the Company's warehouse facilities are open and available for the loading of merchandise during set hours, normally between 5:30 a.m. and 6:30 p.m. (D&DE 3; Tr. 406-408, 729, 734-736, U. Exh. 13). Normally, distributors return to the Company's warehouse at the end of the day and load their trucks for the next day's deliveries (Tr. 404-406). However, if the distributors wish to alter this set method of operation, the Company requires that distributors come in and load their merchandise before 7:00 a.m., after which time the Company will return the goods to storage in the warehouse and charge the distributor a fee for doing so (Tr. 1708-1713). Distributors are also charged a fee of $15 if after they return to the warehouse, they are not ready to load their merchandise by 6:00 p.m. (Tr. 406-408, U. Exh. 13).

The Company employs personnel known as distributor representatives who are responsible for overseeing the operations of the distributors (DOR 3-4; Tr. 167-168, 485-489, 594, 1721-1725). Each of the 5 distributor representatives oversees approximately 10 routes (DOR 4; Tr. 485). Distributor representatives visit the distributors' stores frequently, without asking or notifying the distributors, to check on a variety of matters pertaining to how the distributors are handling the accounts, including the promptness with which the distributors remove stale merchandise from the shelves, the adequacy and effective location of shelving and promotional material, and the merit or lack thereof in store managers' complaints to the Company regarding services rendered (DOR 4; Tr. 485-489, 594, 1721-1725). In the meetings that distributor representatives hold with distributors on the average of once every 3 weeks, they discuss the distributors' route operations and instruct them regarding how

to properly service their accounts (DOR 4; Tr. 488-489, 881). Distributor representatives report distributors' noncompliance with their instructions to the Company's general sales manager for further action, which generally involves a warning that if services are not improved, the distributor may face loss of the account with no remuneration (DOR 4; Tr. 490-495, U. Exh. 10). Since 1967, distributor representatives have generally abandoned the practice of riding with distributors in their trucks in order to observe their route operation (D&DE 4; Tr. 1721-1725). However, on occasion, they request to ride with distributors; and in one instance where permission was refused by the distributor, the distributor representative followed him on his route in a car and visited each store after he finished servicing it (D&DE 4; Tr. 1761-1762).

Distributor representatives have a direct financial interest in seeing that distributors service accounts properly and comply with their instructions because the Company pays them bonuses for increases in sales that they help the distributors achieve (DOR 4; Tr. 488). Distributor representatives have the power to secure compliance with their instructions through their function of resolving disputes between distributors and their stores (D&DE 4; 490-495). In cases where a store refuses to deal further with a distributor, the Company, through its distributor representatives, will examine the problem to determine who is at fault in the dispute (D&DE 4-5; Tr. 490-495, 708-710). If the Company determines that the problem was the stores' fault, it will "protect" the account for the distributor by not allowing other distributors to solicit the account *(ibid.)*. If the distributor representative believes that the loss was the fault of the distributor, the account may be declared "open" to solicitation by others, with no compensation to the distributor who "lost" the account *(ibid.)*. One distributor has lost his route as a result of his alleged dishonesty (D&DE 3; Tr. 422).

B. The unfair labor practice proceeding

A majority of the Company's distributors voted for the Union in the Board's May 18, 1973 election, and the Board certified the Union as the exclusive bargaining representative of these employees on May 29, 1973 (D&O 6). On and after June 6, 1973, notwithstanding the certification by the Board, the Company has refused to bargain collectively with the Union, although the Union has requested it to do so (G.C. Exh. 1(i), 1(j), and 1(k)). Upon a charge duly filed by the Union on June 28, 1973, the Regional Director issued a complaint on July 12, 1973, against the Company, alleging a violation of Section 8(a)(5) and (1) of the Act (G.C. Exh. 1(m)-(o)). In its answer to the complaint, the Company admitted that it had refused to bargain with the Union for the certified unit, but denied that it had violated the Act (G.C. Exh. 1(p)). Thereafter, on August 6, 1973, the General Counsel, in accordance with the Board's rules and regulations, moved for summary judgment by the Board on the complaint (G.C. Exh. 1(a)).

II. THE BOARD'S DECISION AND ORDER

The Board found that all the issues raised by the Company in the unfair labor practice proceeding were, or could have been, litigated in the prior representation proceeding, and, accordingly, the Board granted the General Counsel's motion for summary judgment (D&O 4-5). Thus, the Board concluded that the Company has refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act (D&O 8-9). The Board's order requires the Company to cease and desist from its unfair labor practices, to bargain collectively with the Union in the bargaining

unit in which the Union has been certified, and to post appropriate notices (D&O 9-10).[6]

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE CERTIFIED REPRESENTATIVE OF ITS EMPLOYEES

A. Introduction – The applicable legal principles

The Company's refusal to bargain following the Union's certification is a violation of Section 8(a)(5) and (1) of the Act unless the Company prevails with its contention that the distributors are not "employees" under Section 2(3) of the Act.[7] Section 2(3) provides, in relevant part, that the term "employee" shall not include "any individual having the status of independent contractor." In enacting this provision, Congress did not define independent contractor status, but intended that in each specific case the issue whether an individual is an employee or an independent contractor is to be determined by the application of general agency principles. *N.L.R.B. v. United Insurance Co.*, 390 U.S. 254, 256

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[6] In order to insure that the employees in the unit are accorded the services of their bargaining agent for the period provided by law, the Board construed the initial period of certification as beginning on the date the Company commences to bargain in good faith with the Union (D&O 8). See *N.L.R.B. v. Commerce Co.*, 328 F.2d 600, 601 (C.A. 5, 1964), cert. denied, 379 U.S. 817; *N.L.R.B. v. Burnett Construction Co.*, 350 F.2d 57, 60 (C.A. 10, 1965).

[7] The Company has dropped its alternative contention that the Union is not a "labor organization" within the meaning of Section 2(5) of the Act.

(1968), and cases there cited; *Ace Doran Hauling & Rigging Co. v. N.L.R.B.*, 462 F.2d 190, 193 (C.A. 6, 1972).[8]

Under common law agency principles, a critical factor distinguishing employees from independent contractors is the type and extent of control reserved by those for whom they work. As the Court of Appeals for the Seventh Circuit stated in *N.L.R.B. v. Phoenix Mutual Life Insurance Co.*, 167 F.2d 983, 986 (1948), cert. denied, 335 U.S. 845:

> [T]he test most usually employed for determining the distinction between an independent contractor and an employee is found in the nature and the amount of control reserved by the person for whom the work is done. . . . [T]he employer-employee relationship exists when the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished. . . . [I]t is the right and not the exercise of control which is the determining element. (Emphasis omitted.)

Accord: *The Herald Co., etc. v. N.L.R.B.*, 444 F.2d 430, 432-433 (C.A. 2, 1971), cert. denied, 404 U.S. 990; *Joint Council of Teamsters No. 42 v. N.L.R.B.*, 450 F.2d 1322, 1326-1327 (C.A.D.C., 1971); *Ace Doran Hauling & Rigging Co. v. N.L.R.B., supra,* 462 F.2d at 193; *Deaton Truck Lines, Inc.*, 143 NLRB 1372 (1963), affirmed as to this point, 337 F.2d

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[8] In excluding "independent contractors" from the definition of "employee" in 1947, Congress overuled the substantive holding in *N.L.R.B. v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), insofar as it rested on the premise that agency principles were not dispositive in determining whether an individual was an employee for purposes of the Act. Thus, Congress "merely enacted the change to make clear" that the term "employee" is "not meant to embrace persons outside that category under the general principles of the law of agency," 93 Cong. Rec. 6441-6442, 2 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), p. 1537.

697 (C.A. 5, 1964), cert. denied, 381 U.S. 903. *Restatement of the Law of Agency*, 2d §220(1).

The decision involves "not a purely factual finding by the Board, but . . . the application of law to facts – what do the facts establish under the common law of agency: employee or independent contractor?"; accordingly, the decision, though not one in which the Board applies its special expertise, should be upheld if the Board chose between "two fairly conflicting views." *N.L.R.B. v. United Insurance Co., supra,* 390 U.S. at 260. Accord: *The Herald Co., etc. v. N.L.R.B., supra,* 444 F.2d at 435. Moreover, as the Supreme Court further stated, "[t]here are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor. . . ." And "[i]n such a situation . . . there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common law agency principles." *N.L.R.B. v. United Insurance Co., supra,* 390 U.S. at 258. Turning to the facts of the instant case, we show that the Board's conclusion that the distributors are employees of the Company is supported by substantial evidence under the criteria set out above and, thus, entitled to affirmance.

B. The Company has reserved substantial control over the work of the distributors

With respect to the crucial issue of control, the record reveals that the Company has reserved the right to control, and exercises control over, most significant elements of the distributors' work, including pricing, operating procedures, customer relations, display of merchandise, and even

the retention or sale of the accounts. Thus, in order to purchase a route, distributors are required to pass company-administered tests, undergo a probationary program in which they are extensively trained by the Company,[9] and then sign an agreement prepared unilaterally by the Company. That agreement requires the distributors to: maintain accurate route and customer books, use their best efforts to promote the Company's products and secure new accounts for the Company without regard to their own fixed territory, grant merchandise discounts and rebates to their accounts on the same basis as solely determined by the Company, and follow the Company's procedural regulations for route operation (*supra*, p. 9). Once the Company has established the basis for its right of control by its initial determination of the qualifications of the distributor and the signing of this agreement, the Company thereafter continues to exercise its right of control over distributors' route operations and clearly retains the right to terminate the employment relationship on several grounds including handling competitors' products, wilful neglect of customers, "any act deemed dishonest to customers or the [Company]," or a series of other infractions enumerated in the agreement (*supra*, pp. 5-6). Accordingly, it is clear that, notwithstanding the disclaimer of liability that "the Distributor shall be deemed at all times to be an independent contractor," the Company's contract with the distributors in fact reserves to itself a substantial and highly relevant right of control over the operations of the distributors. See, *N.L.R.B. v. Nu-Car Carriers, Inc.*, 189 F.2d 756, 759-760 (C.A. 3, 1951), cert. den., 342 U.S. 919; *Restatement of the Law of Agency 2d*, §220(1).[10]

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[9] See *N.L.R.B. v. United Insurance Co., supra*, 390 U.S. at 257, 259.

[10] The Company asserts (Br. 8-10, 14-15) that the 1967 change in operations was intended to create independent contractor status and that, in executing the agreements, the distributors willingly accepted that legal status. However, the record, including those portions cited by the Company (Tr. 454-55, 462-65, 472-73), provides

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Moreover, as shown in the Counterstatement, the Company *actually* controls the manner in which distributors conduct their route operations. While the Board recognized that the Company did not supervise the distributors' day-to-day operations (D&DE 3), it nonetheless determined that the Company in fact controlled the major aspects of the distributors' work. Thus, the Company requires compliance with its book of operating procedures, which are strictly enforced. Provision 19, which represents Company policy with respect to shelving and display material, is the basis for the Company's unilateral insistence on deciding how much shelving is necessary in the distributors' stores. Generally, the Company installs such shelving and bills the distributor for the cost; and when a customer insists on having increased shelving, the Company orders the distributor to install it. The Company enforces this power over distributors when one of them resists by declaring that he can no longer service the account or simply by installing the shelving itself and deducting the cost from the distributor's earnings. Likewise, the Company enforces provision 22 which requires distributors to service their accounts once a week or more if necessary. When two distributors refused to service their accounts over a three-day period as a result of a dispute, the Company simply broke into the distributors' trucks, loaded them with merchandise, and delivered the goods to all the stores on the routes, without

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10 (continued) little if any support for the Company's assertions. Other than the self-serving "independent contractor" label attached by the agreement, there is simply no evidence that the distributors knowingly relinquished "employee" status in accepting the Company-initiated changes in 1967. In any event, the parties' intent is not controlling on the question of "employee" vs. "independent contractor" status. In resolving statutory issues, the Board is required to examine the substance of the agreement and "all of the incidents of the relationship" under the agreement. *N.L.R.B. v. United Insurance Co., supra*, 390 U.S. at 258. Where such examination discloses that in fact substantial control has been reserved to the company, the Board properly finds employee status regardless of the classification made by the parties.

paying commissions to the distributors for such sales. And, while the Company does not set specific hours of work for deliveries to customers, it nonetheless forces distributors to conform to its suggested times for delivery and loading by controlling the times it makes its warehouse facilities available. Although the warehouse facilities are nominally open from 5:30 a.m. to 6:30 p.m., distributors must load their merchandise before 7:00 a.m. or the Company will return their goods to the warehouse and charge them a fee. Likewise, distributors are charged a fee of $15 if they are not back in the warehouse at the end of the day and ready to load their trucks by 6:00 p.m. Additionally, the approximately 38 distributors who lease trucks from the Company subsidiary are permitted to use their trucks only on weekdays and only on their snack food routes.

The Company's control is also shown by the fact that it employs distributor representatives to oversee distributors' route operations (*supra*, pp. 10-11). Distributor representatives meet frequently with distributors to discuss their route operations and instruct them how to properly service their accounts. The Company enforces these instructions by warnings to distributors that if their route operation is not improved, they may face loss of the accounts without remuneration. (See, *e.g.*, U. Exh. 10). In cases where a store refuses to deal with a distributor, distributor representatives make a unilateral determination of who is at fault; and if they find the distributor at fault, he faces loss of the account without compensation. One distributor lost an account in this manner because of his alleged dishonesty (D&DE 3; 422). As the Ninth Circuit has noted, the *means* used by the Company to adjust customer complaints is "highly material to the ultimate determination of employee or contractor status." *Brown v. N.L.R.B.*, 462 F.2d 699, 703 (C.A. 9, 1972), cert. den., 409 U.S. 1008.

Although distributor representatives no longer accompany distributors on their routes as a general practice, they occasionally ask to ride along with distributors to observe their performance. Where permission to accompany a distributor was refused, a distributor representative openly followed the distributor along his route and visited each store after it was serviced. Indeed, distributor representatives make it a general practice to visit distributors' stores frequently to check up on certain aspects of their performance such as the promptness with which stale merchandise is removed from shelves, the effectiveness of the distributors' assistance in providing shelving and promotional material, and general complaints about the distributors' services. This control is thorough and continuous, for, as the Board noted (DOR 4), distributor representatives "have a direct financial interest in seeing that their instructions are complied with, since the employer pays them bonuses for increases in sales they help the distributors achieve." The activities of the distributor representatives thus go beyond a common interest in increasing sales and result in detailed examination of, and control over, distributors' route operations.

Compensation and other financial arrangements entered into between the Company and the distributors are similarly indicative of an employer-employee relationship. The Company unilaterally establishes the prices it charges distributors for their merchandise, and the distributors are required to resell these products to chain stores (which make up the entire business of 30 of the 52 routes) at prices set by the manufacturer of the goods.[11] Distributors are also forced to rebate from 3 to 5 percent of their monthly sales to customers because the Company's policy

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[11] The Company errs in suggesting (Br. 31-32, 40) that this means of price control is negated by the fact that the manufacturer (*e.g.*, Wise Potato Chips) negotiates the prices (including temporary reductions and promotions) with the chain store's buyer and informs the Company of those agreed-upon proces. The critical fact is that the distributors have no control over these prices, that there is a pre-determined

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requires it. The Company has absolute control over these rebates, since it receives payment, with rebates already deducted, directly from chain stores and then remits to the distributors their earnings computed solely on the basis of the set prices. Thus, the agreement provides that these pricing controls will result in a distributor earning commissions of approximately 20 percent of his sales less rebates (E. Exh. 5 E). The Company controls prices in exactly the same manner for independent stores which group with others into store associations or cooperatives that deal directly with the manufacturers. As for the prices distributors can charge individual independent store accounts, the Board determined (DOR 3) that the Company substantially controls these prices through frequent advertising in trade publications,[12] and some direct notification, of merchandise prices and temporary price reductions. Where distributors have attempted to refuse to sell merchandise at the Company's suggested prices, their customers have discontinued their purchases until distributors were forced to grant the price reductions. The Company has further pressured distributors into charging the suggested uniform price for merchandise by memoranda sent to distributors advising them that they were

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11 (continued) price which the Company requires the distributors, by virtue of the agreement, to charge their chain store customers (Tr. 520-506, E. Exh. 5E, p. 2). Thus, while the Company may not originate the prices for the chains, it does effectively enforce distributor compliance with those set prices. We submit that this represents a significant aspect of the Company's control over the distributors' earnings.

12 The Company asserts (Br. 37) that it is the manufacturer, rather than the Company, that is responsible for this advertising. However, the record reveals, through the testimony of Company Vice President Kenneth Price, that the Company itself places the advertisements in trade publications, and often directly notifies buyers for retail stores of temporary price reductions and promotions (Tr. 917-922, 995-1001). Thus, here, as elsewhere in its brief, the Company's claim of erroneous fact finding by the Board is totally without merit.

bound to charge the uniform prices by federal government regulations and that if they did not do so, they would be faced with prosecutions and treble damage suits. In sum, distributors have little, if any, latitude with respect to the prices charged for their merchandise as those are set by the manufacturers and enforced by the Company.

Concededly, distributors have some ability to increase their gross earnings by increasing the volume of merchandise they sell to customers or by soliciting new, "open" accounts. However, the agreement between the Company and distributors, which is offered to distributors on a take-it-or-leave-it basis, precludes distributors from soliciting business outside the area serviced by the Company. Moreover, the agreement prevents them from soliciting business from any stores that are already being serviced by any other company also distributing the same products in the Company's franchised area. The record reveals that at least two other companies distribute such products in the area, which effectively minimizes distributors' ability to solicit such new business. When a distributor inadvertently sells merchandise to an unauthorized customer, the Company requires him to return all profits made on such sales. Finally, the Company unilaterally established a policy which prohibits distributors from soliciting business from any new branch of a chain store which is opened. In view of these restraints on distributors' business activity, their ability to increase their earnings has been seriously circumscribed by the Company. Therefore, the Board could properly conclude (D&DE 5) that viewing "all of the record evidence, the distributor's compensation is not controlled only by his own efficiency and efforts, but is effected substantially by the decisions and actions of the [Company]."

Finally, other factors support the Board's finding here. As noted earlier, *supra,* p. 16, the contract that each distributor signs is not negotiated by him, but has terms unilaterally set by the Company. The

contract is of indefinite duration and may be signed by the distributor only after he is interviewed by the General Manager, tested by the Company, and approved as financially responsible. The Company also checks the character and background of applicants who seek to buy routes from other distributors (E. Exh. 12). Each distributor must also complete a 60-day probationary period, during which the Company carefully trains him in route operation. Moreover, while the distributor allegedly has the right to sell non-competitive products not handled by the Company, the Company must approve in writing the sale of those products of manufacturers not dealing with the Company (E. Exh. 12). In addition, the work is obviously not such that it requires a high degree of skill. Finally, the Company, through its warehouse and garage facilities and the room it provides for the filling out of order slips and accounts, supplies the distributor with his "place of work." These factors have been found indicative of employee status in similar cases. See, *N.L.R.B. v. Brush-Moore Newspapers, Inc.*, 413 F.2d 809, 813 (C.A. 6, 1969), cert. denied, 396 U.S. 1002; *N.L.R.B. v. Checker Cab Co.*, 367 F.2d 692, 695 (C.A. 6, 1966); *Blue Cab Co.*, 156 NLRB 489, 498 (1965), enforced, 373 F.2d 661 (C.A.D.C., 1967), cert. denied, 389 U.S. 837; *Restatement of the Law of Agency 2d*, §220(d), (e), (f).

C. The factors relied on by the Company are not determinative of independent contractor status

There are, of course, some factors in this record which are usually associated with independent contractor status. Thus, the Company can point to the fact that the distributors purchase their routes with substantial

down payments,[13] that 14 distributors own their trucks, that distributors may, within the aforementioned limits, set their own hours of work and solicit new accounts, and that the Company does not withhold taxes or provide fringe benefits for the distributors. However, the courts have made it clear that such factors, as well as the agreement's declaration of "independent contractor" status, are not controlling,[14] and that it is the Board's responsibility to assess and weigh "all of the incidents of the relationship . . . with no one factor being decisive." *N.L.R.B. v. United Insurance Co., supra,* 390 U.S. at 258. Here, the Board considered the factors relied on by the Company, but found them to be outweighed by the ample evidence of the Company's effective control over the major aspects of the distributor's job (D&DE 5). In light of this evidence, the Board could properly conclude that, despite the 1967 operational change, the Company "has not relinquished control over the means by which the distributors carry out their responsibilities under the agreements" (DOR 4). At the very least, the Board's determination represents "a choice between two fairly conflicting views" and is thus entitled to affirmance. *N.L.R.B. v. United Insurance Co., supra,* 390 U.S. at 260.

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13 While a proprietary interest may be an attribute of an independent contractor (Co. Br. 23), the test remains the right to control job results and the means of achieving those results. See cases cited *supra*, pp. 13-15. Where, as here, the evidence establishes that such control exists, the presence of some proprietary interest does not undercut the Board's finding of "employee" status. See, *The Herald Co. v. N.L.R.B., supra,* 444 F.2d at 435; *Joint Council of Teamsters No. 42 v. N.L.R.B., supra,* 450 F.2d at 1327.

14 See, *e.g., The Herald Co. v. N.L.R.B., supra,* 444 F.2d at 433; *The News-Journal Co. v. N.L.R.B.,* 447 F.2d 65, 66-67 (C.A. 3, 1971), cert. denied, 404 U.S. 1016; *Ace Doran Hauling & Rigging Co. v. N.L.R.B., supra,* 462 F.2d at 191-192; *N.L.R.B. v. Pepsi-Cola Bottling Co.,* 455 F.2d 1134, 1141 (C.A. 6, 1972).

The Company also attacks the Board's finding of "employee" status on grounds that it is inconsistent with Board and court decisions under the Act and with a ruling from the Internal Revenue Service (Br. 5-7, 52-61). We submit that the alleged inconsistency with other decisions is wholly illusory and that the Board need not accept an IRS ruling as dispositive of issues arising under the Labor Act.

Contrary to the Company's contention (Br. 57-61), the case of *Gold Medal Baking Co., Inc.*, 199 NLRB No. 132, 81 LRRM 1356 (19-72), does not run counter to the Board's decision in the instant case. Thus, as noted by the Board (DOR 2), in *Gold Medal Baking* certain individuals, who had a prior history of representation as driver-salesmen employed by the company, but who had each signed distributorship agreements with the company during later negotiations, were found to have terminated their employee status and become independent contractor distributors of the company's bakery products. However, in marked contrast to the instant case, the Board determined that the driver-salesmen in *Gold Medal Baking, supra*, 199 NLRB at pp. 5-7, (1) were not required to adhere to retail prices suggested by the Company, nor did they do so, (2) were easily able to add their own customers to their routes, and, in fact, did so, and (3) were without supervision by the Company. Here, the Board found that the Company effectively controlled the prices at which the distributors resell to retailers and exercised supervision through both its distributor representatives and by requiring compliance with its book of operating procedures.[15] These facts readily distinguish the instant case from the Board's decision in *Gold Medal*.

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[15] Similar factors were presented in *The Herald Company* case, *supra*, and this Court found that they afforded ". . . a sufficient basis to support the Board's finding that the distributors are employees rather than independent contractors." 444 F. 2d at 435.

The Company's reliance (Br. 52-54) on *Frito-Lay, Inc. v. N.L.R.B.*, 385 F.2d 180 (C.A. 7, 1967), is misplaced. In refusing to enforce the Board's order in that case, the Seventh Circuit made clear that the basis for its decision that individuals were independent contractors, included, *inter alia*, the following factors: (1) the distributors involved resold their snack food goods "at prices they themselves set to customers of their own choice within their respective territories;" (2) the employer had "no say in the manner and frequency of servicing, if at all;" and (3) "it is plain that they are without significant supervision." *Frito-Lay, Inc. v. N.L.R.B.*, 385 F.2d at 185-186. It is equally plain that the aforementioned factors readily distinguish *Frito-Lay* from the instant case. Similarly, other cases cited by the Company contain significant differences in their facts which readily explain the basis for those decisions that the individuals involved were independent contractors. Thus, in *Carnation Co. v. N.L.R.B.*, 429 F.2d 1130, 1132 (C.A. 9, 1970), the court explicitly relied on the fact that those distributors "may sell at prices they see fit," that they are not trained in any way by the employer, and that they "are not supervised in the serving of their customers," to determine their independent-contractor status. Likewise, in *Meyer Dairy, Inc. v. N.L.R.B.*, 429 F.2d 697, 700-701 (C.A. 10, 1970), the court emphasized that distributors there were not bound by any suggested prices and that they possessed and exercised "complete control over their sales." It should also be pointed out that the differing results in these employee-independent contractor cases reflect their diverse and often complex factual settings. As the Eighth Circuit has observed, "[a]bout all that the cases demonstrate is that the test for determining the status of workers is much easier to state than it is to apply . . ., that each case must stand or fall on its own peculiar facts." *Site Oil Company of Missouri v. N.L.R.B.*, 319 F.2d 86, 91 (C.A. 8, 1963). See also, *Maxwell Company v. N.L.R.B.*, 414 F.2d 477, 481

(C.A. 6, 1969), the "different results . . . represent . . . an application of the same principles to somewhat (but not very dramatically) different fact situations". In sum, the cases relied on by the Company do not demonstrate Board inconsistency, but rather, the evaluation of differing factual patterns.

Finally, the Company suggests (Br. 5-7) that the Board's determination overlooked a ruling by the Internal Revenue Service (submitted in the unfair labor practice case) that the Company's distributors are independent contractors for purposes of Federal employment taxes and income tax withholding. That ruling is purportedly based on a "right to control" test (IRS Ruling p. 2). However, the status of the distributors under the tax laws is not determinative of their status for labor relations purposes. The Company makes no claim that the IRS has any special authority or competence with respect to the labor law aspects of its relationship with the distributors or that the IRS ruling is in any way binding upon the Board (Br. 5-7). It appears merely to argue that the Board should have considered and given more weight to the IRS ruling. The Board, however, clearly did consider the ruling, but found that it failed to provide any basis for revising the finding of "employee" status under the Labor Act.

Thus, in its decision (D&O 4, n. 5) the Board indicated that while the ruling of another government agency was a factor worthy of consideration, the determination of "employee" status for Company distributors was fully justified for several reasons. The Board first noted that its "determination was based on a record developed after a hearing in which the parties . . . were given an opportunity to present witnesses and cross-examination . . .," while the IRS ruling on its face, was based on SS-8 forms submitted to the IRS by the Company and ten distributors and on copies of sample contracts for distributorships and other evidence

submitted by the Company. Clearly, the IRS ruling based on this limited record does not require the Board to alter its determination based on a fully developed record, including some 2000 pages of testimony and numerous exhibits. In addition, that complete record supported a Board finding which is at variance with the IRS ruling, namely, that distributors received instructions from the Company at times other than their training period (D&O 4, n. 5). In fact, the record establishes that the Company continuously instructs the distributors on how to properly service accounts and enforces compliance with those instructions (*supra*, pp. 10-11). Further, the IRS ruling issued on September 25, 1973, approximately four months after the Board's decision on review, but failed to mention the Board's decision or its supporting evidence.[16] Thus, the Board had ample reasons for not according it controlling weight (D&O 4, n. 5). In short, the Board in the unfair labor practice proceeding properly adhered to its determination that the distributors are "employees" under Section 2(3) of the Act.

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16 At the time of the issuance of the Board's Decision and Order in the unfair labor practice proceeding on February 22, 1974, the Company submitted a letter dated February 12, 1974, enclosing therewith a copy of a letter dated January 16, 1974, from the IRS, which stated that at the time of the original IRS ruling, the IRS had in its possession "a book of procedures" and was "aware of a related decision by the National Labor Relations Board." Accordingly, on February 27, 1974, the Board issued an Order Amending its Decision and Order, which did amend its prior order to the extent that it deleted one phrase which had stated, "there is no indication that IRS had any knowledge of . . ." the Board proceeding. This belated submission of evidence that the IRS was "aware of" the Board's decision adds nothing to its ruling and does not change the fact that the Board made its determination on the basis of a fully developed record, as opposed to the limited evidence underlying the IRS ruling.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a judgment should be entered denying the petition for review and enforcing in full the Board's order.

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July, 1974.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

LORENZ SCHNEIDER COMPANY, INC., Petitioner,	)	Nos. 74-1336, 74-1495
v.	)	
NATIONAL LABOR RELATIONS BOARD, Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D.C.

this 31st day of July, 1974